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Trends in Government Disclosure

Public Records Division
Office of the Massachusetts Secretary of State
Michael Joseph Connolly, Secretary

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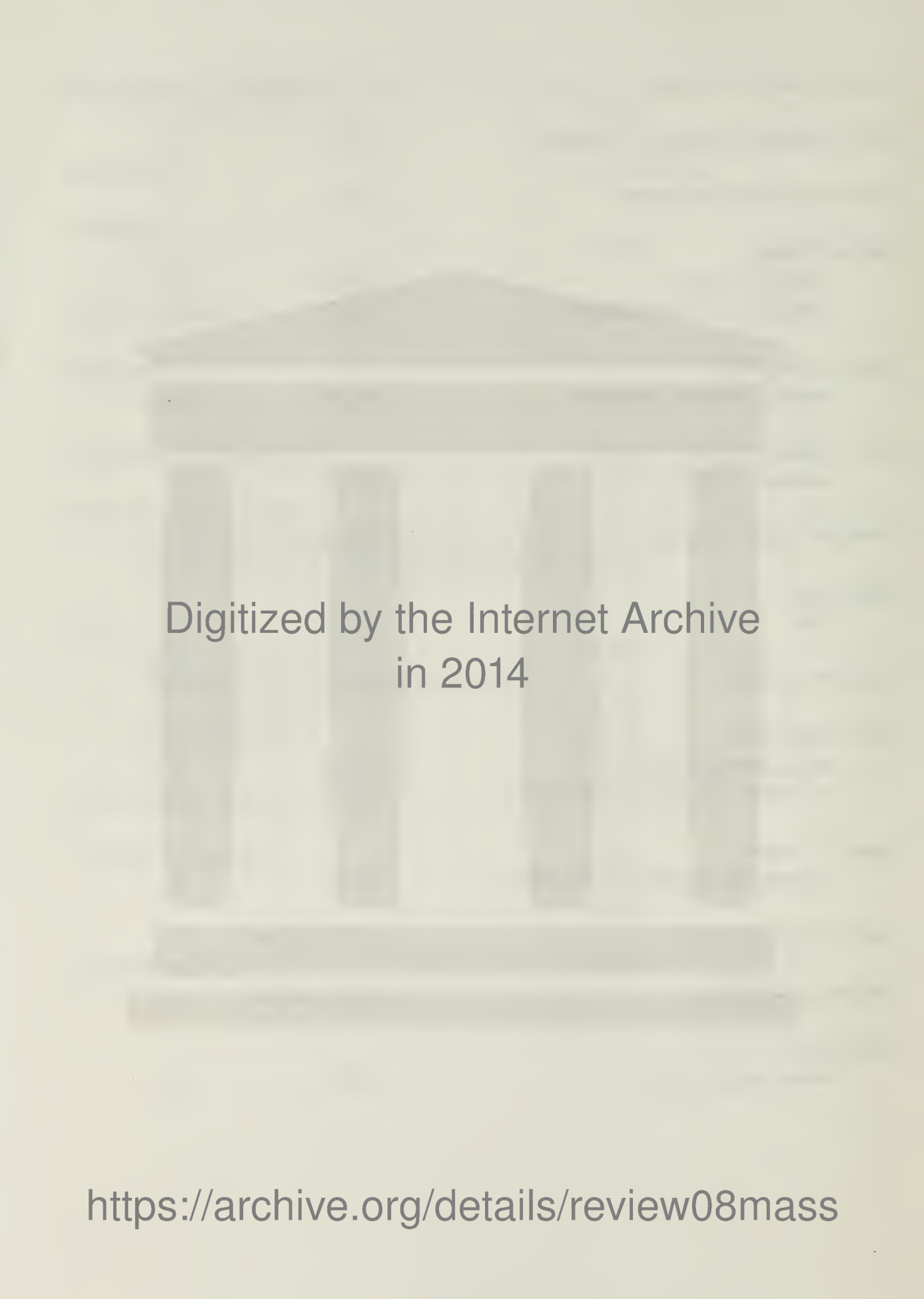
TABLE OF CONTENTS

SUBJECT INDEX



EXEMPTION INDEX

DETERMINATIONS

SPR89/229

ISSUE: Whether executive session minutes discussed at an open meeting in order to determine their public record status become public records by virtue of that discussion.

HELD: Records which are mentioned procedurally in an open meeting do not become public records by virtue of that reference. Such records are not contemplated by the 1969 definition of public records. Therefore, they are not encompassed by the grandfather provision of the Public Records Law. However, records discussed substantively at open meetings and referred to in the minutes thereof are subject to mandatory disclosure.

RATIONALE: The Open Meeting Law protects the confidentiality of executive sessions by allowing the withholding of executive session minutes if release would defeat the lawful purpose of the session. G. L. c. 39, § 23B. In order to determine if release would result in such defeat, a governmental body must necessarily mention the minutes at issue in an open session.

The grandfather provision of the Public Records Law states that all records which were public records under previous definitions will remain so, despite the possible application of an exemption contained in the current statutory definition. One such previous definition provided that "all records referred to in the minutes of meetings..." are public records. Under a literal reading of that definition, any record, including executive session minutes, referred to in the minutes of a meeting would be a public record by virtue of the grandfather provision. However, such a reading would obviate the need for further discussion of the confidentiality of the minutes, thereby rendering the executive session exception of the Open Meeting Law meaningless.

Statutes must be read to complement one another whenever possible. Accordingly, the 1969 definition of public records must be read to include records substantively discussed at an open meeting. Executive session minutes which are referenced at an open meeting for the purpose of determining their public record status do not satisfy that definition of public records and are therefore not "grandfathered" into the current definition of public records.

SPR89/336

ISSUE: Whether exemption (d), the attorney-client privilege, or the work product doctrine exempts from disclosure public contracts, records referred to in the minutes of an open meeting, and other records, where the custodian has filed for a protective order to prevent disclosure.

HELD: The attorney-client privilege and the work product doctrine do not exempt records from disclosure. However, exemption (d) allows the withholding of records relating to policy making and deliberation, including legal strategy. The grandfather provision mandates disclosure of records which satisfy previous definitions of "public records."

RATIONALE: The attorney-client privilege and the work product doctrine are not statutes which expressly or by necessary implication exempt documents from disclosure. Therefore, neither legal principle operates through exemption (a) to allow withholding of records. However, under exemption (d), documents possessing a deliberative or policy making character may be withheld. Legal strategy pertaining to an ongoing case can fairly be considered as falling within the scope of the deliberative exemption.

The grandfather provision of the Public Records Law mandates that all records which were public records under previous definitions remain public, despite the possible application of an exemption contained in the current

statutory definition. One such previous definition provided that "[a]ll records referred to in the minutes of meetings..." are public records. That section also defined as public records "[a]ll contracts...entered into with any person the consideration for which is over fifty dollars...." Thus, any record substantively referred to in the minutes of a meeting, and any contracts the value of which exceed fifty dollars, are public records by virtue of the Public Records Law grandfather provision.

SPR89/444; SPR89/447

ISSUE: Whether various documents retained by the Department of Public Health, pertaining to hospital research protocol, are public records subject to mandatory disclosure.

HELD: Birthdates and social security numbers are exempt from disclosure by virtue of exemption (c). The remaining documents are not encompassed by exemption (a).

RATIONALE: Documents relating to birthdates, social security numbers, and telephone numbers of specific individuals implicate their privacy interests. Exemption (c) exempts data regarding "intimate details of a highly personal nature." Date of birth is indicative of one's age, which is considered information highly personal in nature. An individual's social security number allows one to access a number of files containing personal information. Thus, both date of birth and social security number are excluded from mandatory disclosure by virtue of exemption (c).

Unless indicated as unlisted, telephone numbers do not fall within the parameters of exemption (c), since they are readily available from other sources such as the telephone directory.

There are no statutes exempting the remaining research protocol records in question from disclosure. Therefore,

exemption (a) cannot operate to exempt those records from mandatory disclosure and, since no other exemptions apply, the remaining records are public.

SPR89/448

ISSUE: Whether the name and address of an individual who donates to the government, as well as the donation amount, are public records, where the donor requests anonymity.

HELD: A donor's request for anonymity exempts his name and address from mandatory disclosure. The donation amount is, however, a public record.

RATIONALE: Under the second clause of exemption (c), "intimate details of a highly personal nature" may be withheld from disclosure. However, such withholding is only permissible if the record subject's privacy interest outweighs the public's interest in disclosure. Intimate details of a highly personal nature include marital status, legitimacy of children, medical condition, government assistance, and substance abuse. The mere fact that one contributes to a civic cause does not rise to such a level of intimacy. Therefore, absent other circumstances, exemption (c) does not exempt a donor's identity from disclosure.

Furthermore, an identifiable donor's address is public record because it is readily available from other sources. Moreover, the amount of the gift is public record because the ability to donate one's assets is not an intimate detail which could cause embarrassment and thus does not fall within the privacy exemption.

It is noted, however, that if a donor seeks anonymity, he has a legitimate expectation of confidentiality in the fact of his donation and financial affairs so that his identity may rise to the level of an intimate detail. The public interest in the fiscal

affairs of the government in such circumstances may be satisfied by disclosure of donation amounts. Therefore, exemption (c) may operate to exempt from disclosure the name, address, and any other details identifying a donor who has requested anonymity. Disclosure of donation amounts is always mandated.

SPR89/508; SPR90/008

ISSUE: Whether a response neither confirming nor denying the existence of requested records, the so-called "glomarization" response, is appropriate when denying access to records because of an ongoing investigation.

HELD: A glomarization response is not appropriate where the custodian confirms the existence of an investigation implicitly. However, where the subject of the investigation is unaware of same, or where there is no investigation, the response is permissible.

RATIONALE: The concept of glomarization is effective when the public interest would suffer if a stated reliance on an exemption would implicitly acknowledge the existence of certain documents. Glomarization responses are most effective when the investigation involves a possible criminal activity, there is reason to believe the subject is unaware of the investigation, and when disclosure of the existence of records could reasonably interfere with the investigation. Although Massachusetts courts have not yet addressed glomarization responses, there can be situations involving a Massachusetts investigative agency when disclosure of the mere fact of the investigation could have a detrimental effect and conflict with the public interest.

However, where the record custodian initially relies on an exemption in response to a request for records of an

investigation, he implicitly acknowledges the existence of those records and, therefore, the existence of the investigation. Accordingly, such custodian cannot utilize a glomarization response.

SPR89/516

ISSUE: Whether the names, addresses, and telephone numbers of tenants participating in low-income rental assistance programs are public records subject to mandatory disclosure.

HELD: Information regarding tenants who participate in local housing authority low-income rental assistance programs is exempt from mandatory disclosure by virtue of exemption (c).

RATIONALE: Disclosure of information regarding someone who participates in a local housing authority's low-income rental assistance program implicates the privacy interests of that individual. The second clause of exemption (c) applies to that information which involves "intimate details of a highly personal nature." Qualifying for a low-income rental assistance program indicates that a person is experiencing financial hardship. Disclosure of this information would generally lead to embarrassment for a person of normal sensibilities. Therefore, an individual's financial situation is highly personal in nature. The public's interest in disclosure is clearly outweighed by the individual's right to privacy. Thus, information identifying those tenants participating in low-income rental assistance programs is exempt from mandatory disclosure by virtue of exemption (c).

SPR89/538

ISSUE: Whether the attorneys for three parties in an automobile accident can access the police report of the incident, where party #1 was killed, party #2 was charged with operating to endanger, and party #3 was also involved in the accident.

HELD: Specific entries included in motor vehicle accident reports are mandated by statute and are matters of public record subject to disclosure, with the exception of Criminal Offender Record Information (CORI) operating through exemption (a). CORI regulations permit disclosure to the individual who is the subject of CORI.

RATIONALE: CORI is defined as any information which could identify an individual who is arrested for an incarcerable offense. Dissemination of CORI is restricted by statute. Therefore, CORI is exempt from mandatory disclosure by virtue of exemption (a). However, CORI regulations do permit disclosure to the subject of CORI.

Pursuant to the grandfather provision of the Public Records Law, the motor vehicle accident reports are a matter of public record. Since the CORI Act was passed prior to enactment of the current definition of public records and the grandfather clause, CORI must be redacted from the reports where appropriate. Therefore, provided that operating to endanger is an incarcerable offense, all information subject to the CORI Act must be redacted from the report prior to disclosure to attorneys for parties #1 and #3.

Exemption (c) is also applicable in this case. The autopsy data contained in the police report is considered a medical record under the first clause of that exemption. Consequently, it may be withheld from disclosure.

SPR90/096

ISSUE: Whether minutes of meetings held under the executive session provision of the Open Meeting Law, for the purpose of discussing the deployment of security personnel or devices, are public records subject to the mandatory disclosure provision of the Public Records Law.

HELD: The minutes of executive sessions may be withheld on the basis of the Open Meeting Law operating through exemption (a) as long as their disclosure will defeat the lawful purpose for which the sessions were called.

RATIONALE: The minutes of an executive session may remain secret until such time as their disclosure no longer defeats the lawful purpose for which the meeting was called. Since the minutes of the executive session in question contain techniques and policies still in use by the town's Police Department, the disclosure of these minutes would hinder the effectiveness of those devices. See G. L. c. 39, § 23B(4) (1988 ed.) (providing for executive sessions to discuss the deployment of security personnel or devices). Thus, the Open Meeting Law, operating through exemption (a), allows the withholding of the executive session minutes.

SPR90/113

ISSUE: Whether records relating to unresolved cases of alleged official misconduct may be withheld from disclosure.

HELD: An unresolved allegation of official misconduct is an "intimate detail of a highly personal nature." Records relating to such allegations may be withheld under exemption (c). However, records relating to closed investigations of alleged official misconduct are public records.

RATIONALE: Under the second clause of exemption (c), "intimate details of a highly personal nature" are exempt from mandatory disclosure. If the record meets this standard, the record subject's privacy interest must be weighed against the public's interest in disclosure.

There is a great privacy interest in records relating to unresolved allegations of official misconduct. That privacy interest exempts such records from disclosure unless there is an exceptional public interest in their release. Since there is no exceptional public interest in unresolved allegations of misconduct, such records may be withheld.

On the other hand, once allegations have been resolved, a public official has a greatly reduced privacy interest, since it is presumed that the investigation was conducted fairly. That diminished privacy interest is outweighed by the public's interest in the outcome of the investigation, as well as the manner in which it was conducted. Thus, records relating to closed investigations into such allegations are not encompassed by exemption (c) and are subject to mandatory disclosure.

SPR90/153

ISSUE: Whether a record custodian must provide a copy of an oversized public record where his office equipment is incapable of making a copy and the document must be copied off-site.

HELD: A custodian's lack of necessary copying machinery does not excuse him from providing a copy of a public record.

RATIONALE: No provision of the Public Records Law or the Public Records Access Regulations prevents a person from obtaining a copy of a public record because of the size of the document. Rather, a record custodian must, if necessary, use

outside copying equipment to satisfy a public records request. A custodian may, however, charge the actual cost for providing the record, if it is not susceptible to ordinary means of reproduction.

SPR90/173

ISSUE: Whether medical information concerning an identifiable individual may be withheld from disclosure where the same information is available in court files.

HELD: The availability of the same information from another source does not necessarily negate the exempt status of records which otherwise would fall under exemption (c).

RATIONALE: Medical information concerning an identifiable individual is generally exempt from disclosure by virtue of exemption (c). The availability of the same information from another source, such as court records, is a relevant factor in determining the record subject's privacy interest. On the other hand, such availability is not a dispositive factor in a privacy analysis. Information which has been found sufficiently personal to be withheld under the privacy exemption is often accessible from court files. Records relating to family disputes have been held to fall within exemption (c). Likewise, social security numbers may be withheld under that exemption. Yet, such information can be obtained from court files. Thus, the availability of information, including medical information, from court records does not render exemption (c) inapplicable per se. To hold otherwise would circumvent the purpose of the exemption.

SPR90/174

ISSUE: Whether documents created by holders of research permits, and submitted to a private organization, are public records, where the permits are issued by a governmental entity.

HELD: Documents which are generated and held by private citizens pursuant to a permit are not public records.

RATIONALE: Documents created and held by private citizens pursuant to state-granted research permits cannot be considered records made or received by a governmental entity. Therefore, such documents are not public records.

SPR90/180

ISSUE: Whether local emergency planning committees (LEPCs) are governmental entities subject to the Public Records Law, and whether access to public records can be conditioned by a custodian.

HELD: LEPCs are governmental entities subject to the Public Records Law, and custodians do not have the authority to place conditions upon access to public records.

RATIONALE: The Public Records Law applies to all governmental entities which are custodians of public records. LEPCs satisfy the definition of governmental entity provided in the Public Records Access Regulations. Thus, the duties and obligations imposed by the Public Records Law apply to an LEPC. Additionally, a record custodian may not impose conditions which a requester must meet before that requester can obtain copies of public records. If information is considered a public record, anyone may access that record. Further, public records must be available for inspection in a governmental office.

ISSUE: Whether a government agency can deny access to public information because it is commingled with exempt records in a computer program that is incapable of segregating the two.

HELD: It is the responsibility of the custodian to create a computer program capable of disclosing only the public portion of its data base.

RATIONALE: The definition of public records does not distinguish between paper records and records stored in a computer. All government data, regardless of the medium, are subject to the Public Records Law. It follows that all such records are also subject to the segregability provision of the Public Records Law. That provision compels a custodian to provide public records upon request, and to segregate exempt records when necessary. Accordingly, the custodian is obliged to develop a modified computer program which discloses only the public portions of his data base.

Custodians are not obliged to create a record in response to a public records request. However, the development of a new program to redact exempt data from a computer record is necessary to comply with the segregability provision of the Public Records Law. To hold otherwise would encourage agencies to usurp legislative authority by simply combining exempt and public data on the same computer program, thus providing agencies with a means of legally withholding records that should be accessible to the public. It would be a tragic irony of the computer age if a tool which can facilitate an unprecedented degree of access to public data compiled at public expense could be used as a justification or means to restrict the rights of access which have always been available with paper records.

SPR90/208

ISSUE: Whether a town, pursuant to a by-law, may charge copying fees for certain public records which exceed the fees allowed under the Public Records Access Regulations (Regulations).

HELD: The fee schedule set forth in the Regulations controls unless it conflicts with a more specific statute.

RATIONALE: The enactment of a by-law is not a valid exercise of local power if it conflicts with a general law. The Public Records Law gives the Supervisor of Public Records the power to establish fees for copies of public records. This fee schedule controls unless a more specific statute authorizes otherwise. Absent such other statute, a by-law allowing fees in excess of those allowed by the Regulations conflicts with the Public Records Law. Accordingly, the fee schedule established by the Regulations supersedes the fee established in the by-law.

SPR90/221

ISSUE I: Whether a written appraisal submitted to a board of assessors to augment an abatement application is considered part of the application and, consequently, not a public record by virtue of G. L. c. 59, § 60 (1988 ed.).

HELD: The written appraisal is considered part of the abatement application and is therefore not a public record under G. L. c. 59, § 60 (1988 ed.).

RATIONALE: Under exemption (a), materials which are "specifically or by necessary implication exempted from disclosure by statute" are not public records. The relevant statute is G. L. c. 59, § 60 (1988 ed.), which allows disclosure of abatement

applications only to certain officials. By necessary implication, the statute prohibits disclosure of such applications to the general public.

Written appraisals may reasonably be considered part of abatement applications, when the appraisals are submitted with the applications and are routinely considered as part of the application by the board of assessors. Thus, a written appraisal submitted with an application for abatement is exempt from disclosure by G. L. c. 59, § 60 (1988 ed.), as it operates through exemption (a) of the Public Records Law.

ISSUE II: Whether a record custodian must return an appraisal received with an application for abatement to the individual who submitted it.

HELD: A written appraisal submitted to a town as part of an abatement application becomes a record of the town.

RATIONALE: A record custodian has a duty to protect every original paper of a town without consideration of its public record status and to ensure that records be maintained in a secure location. Moreover, criminal penalties can be imposed for violations of any provision of chapter sixty-six. Therefore, the appraisal cannot be returned to the individual who submitted it.

SPR90/242

ISSUE: Whether records pertaining to the identities and qualifications of semi-finalists for the position of assistant district superintendent are public records.

HELD: The identities and qualifications of semi-finalists for positions of public employment are not sufficiently personal to be exempt from disclosure.

RATIONALE: Under the first clause of exemption (c), personnel information of a personal nature may be withheld from disclosure. The identities of job applicants are personnel information. A general applicant's identity can be considered personal since it is the type of information not normally shared with strangers. However, when an applicant reaches the semi-finalist stage of the selection process, he cannot have the same expectation of privacy in his candidacy. Therefore, such an applicant's identity must be disclosed.

Additionally, the professional credentials of semi-finalists and finalists are also public record. Informed and intelligent discussion of an individual's candidacy for a position of public employment is only possible if his professional credentials are disclosed along with his identity. Examples of professional credentials include education, former employment, and academic achievements. On the other hand, data reflecting specific courses taken, grade point average, and class rank are not public record, as they are deemed personal in nature.

SPR90/244

ISSUE: Whether information contained in a dog bite report and relating to an identifiable individual is public record.

HELD: The names and addresses of dog bite victims are public record. However, details relating to the medical condition of an identifiable individual are not public record.

RATIONALE: Under the first clause of the privacy exemption, information relating to the nature of an identifiable individual's medical condition is exempt from disclosure. The mere fact that an individual was bitten by a dog does not relate to a medical condition. Thus, the name and address of a dog bite victim may not be withheld under exemption (c). However, a description of the dog bite need not be disclosed if it details the individual's medical condition.

ISSUE I: Whether a police department may assess fees for search time for providing access to daily logs.

HELD: Police departments may only charge copy fees for police daily logs. Search time costs may not be assessed in providing access to such logs.

RATIONALE: The Public Records Access Regulations (Regulations) generally allow for the assessment of fees for search time. However, the fee provisions under the Regulations do not control if a more specific statute applies.

The police daily log statute provides that logs must be made available for public inspection at no charge. Therefore, this specific statute supersedes the fee provisions of the Regulations. Accordingly, in providing access to police daily logs, fees may not be charged for search time.

ISSUE II: Whether an indigent requester must be provided with copies of public records at no charge.

HELD: Indigency does not excuse a requester from the fee provisions of the Public Records Law.

RATIONALE: The fee for copies of public records, held by police departments, is fifty cents (50¢) per page as set by statute. There are no provisions in the General Laws which mandate that indigents receive copies of public records at no charge. Custodians are certainly encouraged to waive fees where disclosure of the records is in the public interest. However, they are under no obligation to do so.

SPR90/285

ISSUE: Whether names, addresses, and telephone numbers of dog owners are considered public records.

HELD: The names and addresses of dog owners are considered public records. Listed telephone numbers of those dog owners are also considered public records. However, if individuals indicate that their telephone numbers are unlisted, such numbers fall under exemption (c).

RATIONALE: Exemption (c) exempts intimate details highly personal in nature such as substance abuse, domestic disputes, and receipt of government assistance. The fact that an individual owns a dog does not rise to that level of intimacy. Moreover, the listing of one's telephone number in a public directory suggests little or no privacy interest. Thus, this information is subject to disclosure. Conversely, keeping one's telephone number unlisted indicates a desire to keep this information confidential. Thus, if so indicated to the record custodian, unlisted telephone numbers are considered intimate details highly personal in nature. Because there is no countervailing public interest in associating a dog owner with his unlisted telephone number, this information falls under exemption (c).

SPR90/308

ISSUE: Whether a probation department report filed with a board of selectmen by a liquor license applicant is a public record.

HELD: Neither exemption (c), nor the Criminal Offender Record Information (CORI) Act operating through exemption (a), allows withholding of the report.

RATIONALE: The CORI Act restricts the public's right to access CORI. However, in order to satisfy the definition of CORI, the records must be compiled by a criminal justice agency. A probation department report filed with a board of selectmen by a liquor license applicant cannot be said to have been compiled by a criminal justice agency. Rather, the applicant himself compiled the information because he is the immediate source of the report and the subject thereof. Therefore, the report is not CORI.

Under the second clause of exemption (c), "intimate details of a highly personal nature" may be withheld if there is no countervailing public interest in disclosure. Examples of such intimate details include marital status, medical condition, and reputation. One has a great privacy interest in the contents of his probation report. However, that privacy interest is reduced when one voluntarily submits such a report to town officials to obtain a license.

The public interest in such information with respect to a prospective liquor licensee is great. Moreover, the public has a strong interest in seeing that a licensing board is properly performing its duties. Accordingly, the strong public interest in disclosure outweighs the privacy interest of the record subject. Thus, the second clause of exemption (c) cannot operate to allow the withholding of the report.

SPR90/359

ISSUE: Whether a state authority must provide access to records generated and held by a private consulting firm, where those records relate to the firm's performance of contractual duties owed to the authority, but the contract does not allow the authority access to the records.

HELD: A governmental agency which has neither custody of nor a contractual right to access a record is under no obligation to provide it to a requester.

RATIONALE: A governmental agency is obligated to comply with requests for records in existence and in its custody. Records held by a private firm, access to which is not granted in the firm's contract with a governmental entity, cannot be deemed to be in the custody of that entity. Accordingly, the Public Records Law imposes no duty on the governmental entity to disclose such records.

However, if that entity does have a contractual right to a record, then it has access to that record. Accordingly, the entity is a custodian of that record and the access provisions of the Public Records Law apply.

SPR90/459

ISSUE: Whether exemptions (a) and (c) provide a basis for withholding certain entries in a hepatitis medical report, including the date of report, the type of hepatitis reported, and the reporting hospital.

HELD: Those portions of hepatitis medical reports which include report dates, type of hepatitis, and the reporting hospital cannot be withheld pursuant to exemptions (a) or (c).

RATIONALE: The first clause of exemption (c) requires that medical information which is of a personal nature and which relates to a specifically named individual be absolutely exempt. Where the information sought is limited only to the date of the hepatitis report, the type of hepatitis, and the reporting hospital, that information is not "of a personal nature" and does not pose the threat of directly or indirectly identifying a specific individual with contraction of the disease. Accordingly, exemption (c) is not applicable.

An agency may use exemption (a) as basis for withholding records only where the language of a statute expressly states or indicates that the data is to be withheld. There are no statutes which specifically or by necessary implication exempt the records in question from disclosure. Therefore, exemption (a) is also inapplicable.

CUMULATIVE SUBJECT INDEX

Housing Authority			
-addresses of housing units	7,10-86	9	86/86
-former addresses of tenants	4-84	7	84/24
-in camera review	10-85	3	85/62
-meeting minutes	7,10-86	9	86/86
Industrial Accident Board			
-cases	1,4-85	19	999
Industrial Accident Records	10-84	3	84/51
Inspection Records of Institutions Using Animals for Research Purposes	10-84	13	83/43
Inspector General			
-investigations	1,4-85	9	85/41
Insurance			
-claims	10-83	1	82/217
-Division of Insurance records	10-84	11	84/47
-findings and orders of the Board of Appeal on Motor Vechicles	10-84	9	84/43
-merit rating determinations	4-84	5	83/166
	4-84	5	83/170
-vouchers	1-84	6	82/107
Investigatory Records			
-Board of Registration in Medicine	1-84	9	82/110
	4-86	3	85/291
-correctional	4-88	18	87/75
-housing inspection reports	4-88	4	87/01
-legal bills	10-85	6	85/86
-photographs	8-89	9	88/307
	8-89	11	88/360
-police internal affairs	4-88	15	87/106
	4-88	17	87/82
-security inspection reports	8-89	7	88/154
Landlords, Section 8	1-86	13	85/107
Legal Memoranda	4-86	1	85/248
	7,10-86	9	86/63
	1-87	8	86/63
Lemon Law			
-arbitration application	1-87	16	86/229
Library Users	7-83	1	82/119

Tape Recorded Police Calls	1-84	3	83/96
	1-84	3	83/115
Tax Abatement			
-applications	7-83	1	82/115
	10-84	1	84/136
-blind exemption	10-85	12	85/87
-total amounts	7-85	8	85/71
Tax Delinquents	7-83	5	82/149
	7-85	8	85/71
Tax Records			
-abatement list	10-83	4	82/204
-books of the Tax Collector	8-89	14	88/388
-delinquent taxpayers	10-83	4	82/188
-tax warrants	7-85	8	85/71
-W-2 & 1099 forms of public employees	4-86	10	85/193
Telephone Numbers	4-88	7	87/173
	8-92	3	89/444; 89/447
Telephone Records	1-86	9	85/133
	4-86	10	85/246
	1-87	11	86/381
Termination from Health Insurance Carrier	10-85	9	85/154
Time Sheets			
-public school tutors	8-92	15	90/241
Trade Secrets	1,4-85	8	1038
Veterans	7-84	12	83/62
Veteran's Benefits	7-83	3	82/125
Vital Statistics	1,4-85	3	84/121
	10-85	4	85/144
Voter Registration Information	10-83	11	82/176
Votes of the Board of Fisheries and Wildlife	10-84	4	84/110

Voting List	1-84	10	83/81
	8-89	8	88/236
Warrants	7-85	8	85/71
	1-86	16	85/65
Water Contamination Study	7-84	12	83/62
Water Tested for Nitrate Contamination	10-84	1	84/72
Witnesses	7-85	10	84/222
	10-85	1	85/76
Worker's Compensation			
-claimant's file	1-87	10	86/257
-identity of recipient	8-89	13	88/375
Working Notes	8-89	19	88/434

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